TABLE OF CONTENTS

	Page
Opinions Below	1
Counter-Statement of Facts	2
ARGUMENT:	
POINT I: The constitutional question here involved does not warrant consideration by the Supreme Court of the United States	8
POINT II: The subject zoning ordinance, insofar as it pertains to respondents' tracts of land, is confiscatory and, therefore, invalid	10
Conclusion	14
Addendum "A" Order Denying Petition for Certification	A1
Addendum "B" Order Denying Appeal	A2
CASES CITED:	
Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587, 117 A.L.R. 1110 (Ct. App. 1938)	12, 13
Brandon v. Montclair, 124 N.J.L. 135, 11 A.2d 304 (Sup. Ct. 1940) aff'd. 125 N.J.L. 367, 15 A.2d 598 (E. & A. 1940)	11
Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016 (1926)	8, 10
Gruber v. Mayor and Tp. Com. of Raritan Tp., 39 N.J. 1, 186 A.2d 489 (1962)	12

TABLE OF CONTENTS

CASES CITED: Page

Katobimar Realty Co. v. Webster,
20 N.J. 114, 118 A.2d 824 (1955) 12

Kozesnick v. Montgomery Twp.,
24 N.J. 154, 131 A.2d 1 (1957) 12

Morris County Land, etc. v. Parsippany-Troy Hills, Tp.,
40 N.J. 539, 193 A.2d 232 (1963) 12

Nectow v. Cambridge,
277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447 (1928) 8, 11

Raskin v. Morristown,
21 N.J. 180, 121 A.2d 378 (1956) 12

Tidewater Oil Co. v. Mayor and Council of Carteret,
44 N.J. 338, 209 A.2d 105 (1965) 8

United Advertising Corp. v. Maplewood,
136 N.J.L. 336, 56 A.2d 407 (Sup. Ct. 1947) 12

STATUTE CITED:

N.J.S.A. 40:55-32 6

AUTHORITIES CITED:

Anderson, American Law of Zoning (1968 Edition) Vol. 1, § 2.11, p. 57 8

Anderson, American Law of Zoning (1968 Edition), Vol. 1, § 2.22, p. 93 (1972 Cumulative Supplement, p. 24) 13

TABLE OF CONTENTS

Page

AUTHORITIES CITED:

McQuillan, Municipal Corporations (Third Edition) (1965 Revised Volume), Vol. 8, § 25.45, p. 115 .. 13

Rathkopf, The Law of Zoning and Planning, (1972 Edition) Vol. 1, Chap. 6 13

Yokley, Zoning Law and Practice (Third Edition), Vol. 1, § 2-1, pp. 53, 68 (1972 Cumulative Supplement, p. 13) 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. _____

FRANK SCHERE; JACOB BLACK; ANNA BLACK; DAVID ROBINSON; LILLIAN ROBINSON; LAWRENCE COHEN; BARBARA COHEN; and SALLY TANNENBAUM,

Respondents,

vs.

TOWNSHIP OF FREEHOLD,

Petitioner.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Law Division, is unreported and appears as Appendix A of the Petition for Writ of Certiorari, pages 1a through 20a.

The opinion of the Superior Court of New Jersey, Appellate Division, is reported in 119 N.J. Super. 433, 292 A.2d 35 (App. Div. 1972).

Petitioner's Petition for Certification to the Supreme Court of New Jersey was denied and Petitioner's appeal to the Supreme Court of New Jersey was dismissed September 21, 1972. Copies of the Orders of denial and dismissal appear, respectively, as Addendum "A" and Addendum "B", printed *infra* at pages A1 and A2.

COUNTER-STATEMENT OF FACTS

Respondent Schere is the owner of a tract of land in Freehold Township, Monmouth County, New Jersey, known as the Buck Farm and approximately 108 acres in area. Respondents Cohen and Tannenbaum are the owners of a tract of land in said Township known as the Wardell Farm and approximately 215 acres in area.

The locations of the Buck Farm and Wardell Farm and uses and zones surrounding the same are as shown upon Exhibit P-23 prepared by respondents' expert witness, James P. Kovacs, a professional engineer (T92-10) and upon Exhibits P-25 (T120-9) and P-26 (T127-14) prepared by respondents' expert witness, John D. Lazurus, a real estate broker, consultant and appraiser. The Buck and Wardell Farms and areas surrounding the same are more fully and completely described in the testimony of the aforesaid two expert witnesses. The Buck Farm and uses and areas surrounding the same are shown in the series of photographs, Exhibit P-31 in evidence. The present zoning of the entire township is shown upon the large exhibit, Exhibit J-1, and upon the map which appears as a part of Exhibit P-9 (T56-17).

The history of zoning in the Township of Freehold is briefly as follows:

The first zoning ordinance of Freehold Township, was adopted October 2, 1953. By this ordinance, six zones were established, as shown upon the "Zoning Map of Freehold Township, Monmouth County, New Jersey, 1953" (Exh. P-1). Except for strip zoning along State Highway Route 9 and some areas principally abutting and lying to the southwest and east of the Borough of Freehold, the entire township was placed in the Residention A Zone wherein the minimum lot area was 20,000

square feet and minimum lot width was 100 feet. The premises of respondents in both of these actions were placed in said Residential A Zone.

The first amendment of said original ordinance was adopted February 25, 1965 (Exh. P-2), and merely added to the uses prohibited in the Industrial E Zone.

A further amendment adopted May 24, 1965 (Exh. P-2), was a so-called interim ordinance which purported to amend the original ordinance "pending the completion of the necessary studies and the adoption of appropriate standards" to be included in a proposed new comprehensive zoning ordinance for the township. This interim ordinance purported to impose upon all residential zones other than an existing B-1 Residential Zone certain specified restrictions, including a requirement that no lot area therein should be less than 40,000 square feet and no lot width or lot depth less than 200 feet.

A further amendment also adopted May 24, 1965 (Exh. P-2), prohibited future construction of dwellings in any industrial or commercial zone.

A further amendment known as "The Township of Freehold Zoning Ordinance, 1965, Revision 2" was adopted June 14, 1965 (Exh. P-2). This established certain restrictions on the location of "filling stations."

A further amendment was adopted on December 27, 1965 (Exh. P-2). This amendment placed certain specified areas formerly situate in the Residential A Zone in the Industrial E Zone. This ordinance also, in Section 3 thereof, amended the original zoning ordinance and zoning map incorporated therein to reflect the aforesaid change in zoning.

A further amendment was adopted February 28, 1966 (Exh. P-2). This rezoned certain premises described therein from the Commercial D Zone to the Residential A Zone.

A further amendment was adopted April 25, 1966 (Exh. P-2). This prescribed certain restrictions and standards for the Commercial D or Highway Development Zone.

A further amendment was adopted May 23, 1966 (Exh. P-2). This prescribed and amended restrictions and standards for the Commercial D or Highway Development Zone.

A further amendment was adopted August 22, 1966 (Exh. P-2). This purported to amend and supplement the original ordinance so as to require a minimum lot width of 200 feet and a minimum lot depth of 160 feet in the Residential A Zone.

A further amendment was adopted September 22, 1966 (Exh. P-2). This amended and supplemented the provisions respecting the Industrial E Zone.

A further amendment was adopted October 10, 1966 (Exh. P-2). This defined the terms "Home Occupation" and "Home Professional Occupations" and provided for such uses by way of special use permits in residential zones.

A further amendment was adopted April 22, 1968 (Exh. P-2). This ordinance removed a large area adjacent to the Buck Farm on the south from the Residential A Zone and placed it in the Industrial E Zone.

On January 13, 1969, there was introduced and passed on first reading what purported to be a comprehensive revision of the original zoning ordinance as theretofore amended and supplemented (Exh. P-3, Map).

COPY BOUND TO

This ordinance, never finally adopted (T3-19), would have continued the Buck Farm in the R-40 Zone where it had been placed by the interim ordinance adopted May 24, 1969. This ordinance would have placed the Wardell Farm partly in the R-40 Zone, in which the entire Wardell Farm had been placed by said interim ordinance, and partly in the R-25 Zone. This ordinance, as introduced, gave rise to a great deal of opposition and controversy (T49-17, T55-20). Petitions for changes were submitted by various groups of citizens to the Township Committee. A "Blue Ribbon" study committee of "residents in Freehold Township and business people" was appointed by the Mayor (T50-9) to "go out and meet as a body, talk to the people in the different areas, get a look at the township, and then come back with their recommendations on the zoning ordinance. . . ." On March 10, 1969, while the ordinance introduced January 13, 1969, was still pending, a lengthy amendment (Exh. 4A, B Map) (by which, among other things, the entire Wardell Farm was continued in the R-40 Zone) thereto was introduced and passed its first reading. Both said ordinance and said amendment were brought up for public hearing and further consideration on May 26, 1969. The amendment was actually voted upon and passed by the affirmative vote of three members of the five-member Township Committee (T307-1) with two members abstaining (T307-4). For some reason, no vote was taken upon the basic ordinance introduced January 13, 1969, with the result that neither the ordinance nor the amendment ever became effective. After this fatal defect in adoption had been brought to the attention of the Court upon the date originally scheduled for trial, the matters were adjourned to permit correction thereof.

On March 8, 1971, there was introduced and on April 12, 1971, adopted a zoning ordinance (T56-6 through 23)

TOO CLOSE IN CENTER

(Exh. P-9) which, except for the incorporation of two amendments one dealing with garden apartments and one dealing with planned adult communities, was identical with that introduced January 13, 1969, as that ordinance was intended to be amended by the amendment introduced March 10, 1969 (T237-6). It was stipulated and understood by the Court and all parties at the trial that, insofar as the ordinance of April 12, 1971, pertained to the premises of the respondents there was no change and that it was, in effect, the same ordinance as the ordinance and amendment thereto purportedly adopted May 26, 1969, and referred to in the pleadings, that it was attacked upon the same grounds and that additional pleadings would be unnecessary (T4-18).

Like the ordinance introduced January 13, 1969, that adopted April 12, 1971, recited in Article 2 among the purposes for which said ordinances were to be adopted not only those permissible purposes and essential considerations for zoning prescribed by *N.J.S.A.* 40:55-32 but also the following: ". . . provide a well balanced community and stable economic structure; control rate and direction of growth. . . ."

By the April 12, 1971 ordinance, both the Buck Farm and the Wardell Farm were continued in the R-40 Zone in which they and all other property theretofore situate in residential zones, other than the B-1 Residential Zone as it then existed, had been placed by the interim ordinance May 24, 1965. All other property placed by said interim ordinance in R-40 Zone, with the exception of those properties for which subdivision approval had been secured prior to the adoption of the interim ordinance, various small areas surrounded by or adjacent to the properties so subdivided and certain properties placed in commercial or industrial zones by amendments adopted

prior to May 26, 1969, were, by the April 12, 1971 ordinance, placed in either the R-40 Residential Zone or the RR Residential Zone (Exh. P-4A and B, Exh. J-1). The bulk and use requirements for the R-40 and RR Zones are identical except that, in the former, garden apartments are, to a limited extent, permitted by way of special exceptions and subject to the stringent provisions of Article 10:26-9 and planned adult communities are permitted subject to the stringent and procedurally cumbersome provisions of Article 11.

It was and is the position of the respondents:

1. That the April 12, 1971 ordinance, as applied to the premises of the respondents is illegal, discriminatory, confiscatory, unreasonable, arbitrary and violates the Constitutions of the State of New Jersey and of the United States; higher restrictions have been placed upon said premises although no changes have taken place to justify imposition thereof; said restrictions are not reasonably adapted to accomplish the purposes for which zoning is permissible; said restrictions are imposed without reasonable consideration being given to the prior existing character of the area, its suitability for particular purposes, the conservation of property value or the most appropriate use of land throughout the Township of Freehold.

2. That said ordinance did not represent final or comprehensive zoning but that, with respect to respondent's premises and all other lands continued and placed in the R-40 and RR Zones, it illegally continued in effect the interim zoning put into effect by the interim ordinance adopted May 24, 1965, far beyond a period reasonable for the duration of an interim ordinance.

ARGUMENT

POINT I

The constitutional question here involved does not warrant consideration by the Supreme Court of the United States.

Since deciding the two leading cases, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016 (1926) and *Nectow* v. *Cambridge*, 277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447 (1928), the Supreme Court of the United States has heard comparatively few zoning cases. "The case-by-case examination of the effect of zoning regulations upon specific parcels of lands has gone forward in the state courts, following the pattern established in *Nectow* and *Euclid*." Anderson, *American Law of Zoning* (1968 Edition) Volume 1, § 2.11 at page 57.

The instant cases involve no new Constitutional principles and no novel application of well established Constitutional principles. Discussion of this aspect of the matter by the Supreme Court of New Jersey in *Tidewater Oil Co.* v. *Mayor and Council of Carteret*, 44 N.J. 338, 341, 209 A.2d 105, 107 (1965) is pertinent. At 44 N.J. 343, 209 A.2d 108, the Court said:

> "The plaintiffs' conclusional contention that the ordinance prohibition of the proposed use by Tidewater is unconstitutionally capricious and discriminatory is broadly cast in the familiar due process and equal protection concepts of the Fourteenth amendment. But the supporting argument boils down, as in most cases of this kind, to a claim that, in this particular factual setting, the ordinance treatment is unreasonable because not within the purposes and essential

considerations or the requirement of uniform regulations specified by the zoning enabling act as necessary to undergird valid local legislation. *N.J.S.A.* 40:55-31 and 32. While these statutory prerequisities have loose constitutional connotations, the fundamental question here resolves itself into a matter of application of statutory standards to a particular factual situation under long established principles. At this relatively advanced stage of the law of land use regulation, it will be the rare case concerned with the validity of use classification which will present an issue of sufficient constitutional involvement for purposes of the double appeal provision. See *Vickers v. Township Committee of Gloucester Township*, 37 N.J. 232, 234 (1962), *cert. denied* and appeal dismissed 371 U.S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 495 (1963), and *Morris v. Postma*, 41 N.J. 354 (1964), where fundamental questions of the right to exclude common uses from an entire municipality were at stake. We recognize, of course, that new constitutional questions of substance may arise in a generally settled field of law. Also it should be noted that constitutional issues sufficient in the early development of a new area for such appeal purposes may become so settled through the course of judicial decisions as one day to become no longer worthy of a second review without leave. We conclude that cases falling into the type of this one are not appealable from the Appellate Division as of right."

It is submitted that the present state of the law of zoning is such that the issue of whether or not a particular zoning ordinance, as it affects a particular tract of land, is so arbitrary and unreasonable as to be confiscatory and, therefore, invalid is one for the courts of the state in which the matter arises and does not warrant intervention by the Supreme Court of the United States.

POINT II

The subject zoning ordinance, insofar as it pertains to respondents' tracts of land, is confiscatory and, therefore, invalid.

At 119 N.J. Super. 436, 292 A.2d 37, Superior Court of New Jersey, Appellate Division, in deciding the instant case, said:

> "We do not here suggest that fiscal considerations may not properly be given some weight in zoning. But we do aver that such considerations will not justify imposing substantial functional non-utilization of a property owner's lands. To do so is both confiscatory and to zone without 'due regard to the character of the district and its peculiar suitalibity for particular uses.' *Raskin v. Morristown*, 21 N.J. 180, 198 (1956). We are constrained to the conclusion that this is what has occurred here, and we find no substantial credible evidence to support the trial judge's finding to the contrary. Such zoning treatment of privately held lands is invalid. *Morris County Land, etc. v. Parsippany-Troy Hills Tp.*, 40 N.J. 539, 557 (1963); *Gruber v. Mayor and Tp. Com. of Raritan Tp.*, 39 N.J. 1, 12 (1962). The presumption of validity of the questioned provision of the ordinance has been satisfactorily overcome."

It has been well established by the Supreme Court of the United States, by the courts of New Jersey and by the courts of other states that zoning ordinances which impose "substantial functional non-utilization of a property owner's lands" are unreasonable and confiscatory and, therefore, invalid. In *Euclid v. Ambler Realty Co., supra*, page 8, Justice Sutherland, at 272 U.S. 395, 71 L. Ed. 314, pointed out that:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."

See also *Nectow v. Cambridge, supra* page 8, in which a zoning ordinance so restricting a tract of land that no practical use could be made of it was set aside as unreasonable.

In *Brandon v. Montclair*, 124 N.J.L. 135, 11 A.2d 304 (Sup. Ct. 1940) *affirmed* 125 N.J.L. 367, 15 A.2d 598 (E. & A. 1940), a leading case in New Jersey, Justice Heher, speaking for the Court, at 124 N.J.L. 143, 11 A.2d 309, said:

> "It is not within the legislative province so to exercise the power as to preclude the use of the individual property for all purposes to which it is reasonably adapted. The statutory provision for relief against 'unnecessary hardship' ensuing from a 'literal' application of the ordinance was designed to permit reasonable use of the particular property, and thus to guard against an unwarranted interference with the fundamental right of property, *i.e.*, to secure reasonable zoning. A 'special exception' is, however, required to be 'in harmony with' the 'general purpose and intent of the ordinance. The phrase 'unnecessary hardship' takes special quality from the subsequent clause allowing a variance 'so that the spirit of the ordinance shall be observed and substantial justice done.' *R.S.* 1937, 40:55-36 40:55-39. The restrictions may be so unreasonable in the given case as to be confiscatory; and, in those circumstances, the general rule must be struck down as arbitrary and oppressive."

See also *United Advertising Corp. v. Maplewood*, 136 N.J.L. 336, 342, 56 A.2d 406, 410 (Sup. Ct. 1947); *Katobimar Realty Co. v. Webster*, 20 N.J. 114, 122; 118 A.2d 824, 828 (1955); Raskin v. Morristown, 21 N.J. 180, 197, 121 A.2d 378, 385 (1956); *Kozesnick v. Montgomery Twp.*, 24 N.J. 154, 182, 131 A.2d 1, 16 (1957); *Gruber v. Mayor and Tp. Com. of Raritan Tp.*, 39 N.J. 1, 12, 186 A.2d 489, 495 (1962); *Morris County Land, etc. v. Parsippany-Troy Hills Tp.*, 40 N.J. 539, 193 A.2d 232 (1963). In *Morris County Land, etc.* at 40 N.J. 556, 193 A.2d 242, Justice Hall, speaking for the Court, said:

> "We cannot agree with the trial court's thesis that, despite the prime public purpose of the zone regulations, they are valid because they represent local exercise of the police power in view of the nature of the area and because the presumption of validity was not overcome. In our opinion the provisions are clearly far too restrictive and as such are constitutionally unreasonable and confiscatory. As was said in *Kozesnik v. Montqomery Township*, 24 N.J. 154, 182 (1957): 'That a restraint against all use [for the benefit of another private land owner] is confiscatory and beyond the police power and statutory authorization is too apparent to require discussion' (insertion ours). *The same result ordinarily follows where the ordinance so restricts the use that the land cannot practically be utilized for any reasonable purpose or when the only permitted uses are those to which the property is not adapted or which are economically infeasible. Gruber v. Mayor and Township Committee of Raritan Township*, 39 N.J. 1, 12 (1962); *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 15 N.E. 2d 587, 117 A.L.R. 1110 (Ct. App. 1938). Judge Lehman's oft-quoted sentence in the latter case epitomizes the situation: 'The only substantial difference, in such case, between restriction and actual taking, is that the restriction

COPY BOUND TO

> leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.' (15 N.E. 2d, at p. 592.)" (Emphasis supplied.)

For cases and authorities to the same effect in other states, see the leading case of *Arverne Bay Construction Co. v. Thatcher,* cited above by Justice Hall, and the cases cited and collected in the following texts: Rathkopf, *The Law of Zoning and Planning,* (1972 Edition) Volume 1, Chapter 6; Yokley, *Zoning Law and Practice* (Third Edition), Volume 1, § 2-1 at pages 53, 68 and in the 1972 Cumulative Supplement at page 13; Anderson, *American Law of Zoning* (1968 Edition), Volume 1, § 2.22 at page 93 and in the 1972 Cumulative Supplement at page 24 and McQuillan, *Municipal Corporations* (Third Edition) (1965 Revised Volume), Volume 8, § 25.45 at page 115 and in the 1972 Cumulative Supplement at page 20.

In the instant case, the unreasonable and confiscatory nature of the ordinance in question, as applied to respondents' lands, was made fully apparent to the Superior Court of New Jersey, Appellate Division. At 119 N.J. Super. 436, 292 A.2d 37, the Court said:

> "The opinions of the plaintiffs' experts outlined above are strongly buttressed by the history, amply portrayed in the record, leading to the adoption of these zoning amendments. This indicates that the governing body's adoption of the restriction here involved was designed to inhibit residential development in the municipality at a rate which would outstrip what the town fathers thought the voters and taxpayers would accept in fiscal outlay to supply ancillary municipal services (schools, etc.). It is implicit in the record that the 40,000 square foot restrictions imposed for the R-40 zones were believed to be effective for that purpose as not industrially acceptable to prospec-

TOO CLOSE IN CENTER

> tive builders. This appraisal has been borne out by the fact that there has been little or no development of homes on 40,000 square-foot lots since that restriction was first adopted by Freehold in 1965."

Under the circumstances, it is submitted that the Appellate Division properly held that "The presumption of validity of the questioned provision of the ordinance has been satisfactorily overcome," 119 N.J. Super. 437, 292 A.2d 37.

The Supreme Court of New Jersey saw no reason to disturb that result (Addendum page A1, and Addendum page A2).

CONCLUSION

For the reasons and in the light of the authorities hereinabove discussed and cited, it is respectfully submitted that the Petition for Writ of Certiorari in the matter should be denied.

Respectfully submitted,

/s/ William R. Blair, Jr.
WILLIAM R. BLAIR, JR.
Attorney for Respondents

ADDENDUM "A"

IN THE

SUPREME COURT OF NEW JERSEY

C-10 SEPTEMBER TERM 1972

FRANK SCHERE, et al.,
Plaintiffs-Petitioners,

vs.

TOWNSHIP OF FREEHOLD, et al.,
Defendants-Respondents.

Order Denying Petition for Certification
(Filed September 21, 1972)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.*

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 21st day of September, 1972.

A TRUE COPY

/s/ Florence R. Peskoe
Acting Clerk of the
Supreme Court

---

* N.B. 12/6/72 called Mrs. Peskoe who advised costs would be only those in the Supreme Court.

ADDENDUM "B"

IN THE

SUPREME COURT OF NEW JERSEY

C-10 SEPTEMBER TERM 1972

FRANK SCHERE, et al.,
Plaintiffs-Petitioners,

vs.

TOWNSHIP OF FREEHOLD, et al.,
Defendants-Respondents.

Order Denying Appeal
(Filed September 21, 1972)

This matter having been duly presented to the Court, it is Ordered that the appeal is dismissed pursuant to Rule 2:12-9.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 21st day of September, 1972.

A TRUE COPY

/s/ Florence R. Peskoe
Acting Clerk of the
Supreme Court